

The Presumption of Dangerousness: How New York's SAFE Act Reflects Our Irrational Fear of Mental Illness

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I. INTRODUCTION

In the wake of the Sandy Hook Elementary School shooting of 2013, the State of New York enacted broad gun control legislation that limited the possession, registration, and sale of assault weapons; restricted the maximum capacity of ammunition magazines; tightened rules regarding firearm storage; changed some of the standards for firearms background checks; and introduced new standards in gun control for the mentally ill.¹ This paper focuses exclusively upon the provisions of the Act affecting mental illness, through an analysis of the historical foundation for the frequent association between mental illness and dangerousness; a brief overview of mental illness gun legislation prior to the Act; and an examination of the application of such legislation under the Second Amendment and the Due Process Clause of the Fourteenth Amendment. This paper argues that the mental illness provisions of the New York SAFE Act intrude too deeply into protected individual interests in confidentiality, the fundamental right to bear arms, and due process of law.

II. A BRIEF HISTORY OF THE PRESUMPTION OF DANGEROUSNESS

The association between mental illness and violence has existed for thousands of years. Socrates is said to have asked Alcibiades, “[h]ow could we live in safety with so many crazy people? Should we not long since have paid the penalty at their hands, and have been struck and beaten and endured every other form of ill-usage which madmen are wont to inflict?”² Shakespeare’s Claudius warned of Hamlet, “[t]he terms of our estate may not endure [h]azard so dangerous as doth hourly grow [o]ut of his lunacies.”³ The

¹ See N.Y. PENAL LAW § 265.00(22)-(23) (Consol. 2013) (assault weapons and ammunition magazines); N.Y. PENAL LAW § 265.45 (Consol. 2013) (firearm storage); N.Y. PENAL LAW § 400.03(5)-(6) (Consol. 2013) (background checks).

² PLATO, ALCIBIADES II, 4 (Benjamin Jowett trans., Project Gutenberg 2008) available at <http://www.gutenberg.org/ebooks/1677>; see John Monahan, *A Terror to Their Neighbors: Beliefs About Mental Disorder and Violence in Historical and Cultural Perspective*, 20 BULL. AM. ACAD. PSYCHIATRY L. 191, 193 (1992).

³ WILLIAM SHAKESPEARE, HAMLET act 3, sc. 3.

association remained prevalent during the birth of the United States. In 1751, Benjamin Franklin petitioned to the Pennsylvania Assembly, “the Number of Persons distempered in Mind and deprived of their rational Faculties has increased greatly in this province. Some of them going at large are a Terror to their Neighbors, who are daily apprehensive of the Violences they may commit.”⁴

Lawmakers have, throughout American history, attempted to develop systems that protect the public from the potential danger posed by the mentally ill. In 1788, the New York legislature passed “An Act for Apprehending and Punishing Disorderly Persons,” which authorized the apprehension of persons “who, by lunacy or otherwise, are furiously mad, or are so far disordered in their senses that they may be dangerous to be permitted to go abroad.”⁵ The Massachusetts Supreme Judicial Court explained in 1845 that the “right to restrain an insane person of his liberty is found in that great law of humanity, which makes it necessary to confine those whose going at large would be dangerous to themselves or others.”⁶

The leading case adopting a standard for a determination of dangerousness is *Lessard v. Schmidt*,⁷ a 1972 decision from the Eastern District of Wisconsin.⁸ In *Lessard*, a three-judge panel held that:

[a]lthough attempts to predict future conduct are always difficult, and confinement based upon such a prediction must always be viewed with suspicion, we believe civil confinement can be justified in some cases if the proper burden of proof is satisfied and dangerousness is based upon a finding of a recent overt act, attempt or threat to do substantial harm to oneself or another.⁹

Relying on *Lessard*, the Middle District of Alabama held in *Lynch v. Baxley* that:

⁴ Monahan, *supra* note 2, at 193.

⁵ N.Y. LEG. DOCS. OF THE S. OF THE STATE OF N.Y., at 21 (1885).

⁶ Matter of Josiah Oakes, 8 Law Rep. 122, 125 (Mass. 1845).

⁷ 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated on other grounds*, 414 U.S. 473 (1974), *remanded to* 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated on other grounds*, 421 U.S. 957 (1975), *reinstated on remand* 413 F. Supp. 1318 (1976).

⁸ See Reed Groethe, *Overt Dangerous Behavior as a Constitutional Requirement for Involuntary Civil Commitment of the Mentally Ill*, 44 U. CHI. L. REV. 562, 569 (1977) (“The leading case adopting an overt dangerous behavior requirement is *Lessard v. Schmidt*.”).

⁹ *Lessard*, 349 F. Supp. at 1093.

[a] mere expectancy that danger-productive behavior might be engaged in does not rise to the level of legal significance when the consequence of such an evaluation is involuntary confinement. To confine a citizen against his will because he is likely to be dangerous in the future, it must be shown that he has actually been dangerous in the recent past and that such danger was manifested by an overt act, attempt or threat to do substantial harm to himself or to another.¹⁰

Several other courts subsequently held that predictions of dangerousness must be founded upon evidence of an overt dangerous act, attempt or threat.¹¹ In the aftermath of the *Lessard* decision, other courts held conversely that evidence of overt behavior is not a requirement for a finding of dangerousness.¹²

In *O'Connor v. Donaldson*, the Supreme Court of the United States held that states could exercise their police power to confine individuals for the sole purpose of protecting society “from the dangers of significant antisocial acts or communicable disease.”¹³ The Court also held, however, that a state “cannot constitutionally confine without more a non-dangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.”¹⁴ The Court did not elaborate upon any specific means for establishing dangerousness, or mention any requirement of evidence of an overt act. In the wake of this decision, most states ensured that involuntary commitment of the mentally ill was statutorily conditioned upon a finding of dangerousness.¹⁵ States continued to differ concerning whether an

¹⁰ 386 F. Supp. 378, 391 (M.D. Ala. 1974).

¹¹ See Groethe, *supra* note 8, at 570-573 (“[S]everal cases have espoused an overt behavior requirement . . .”) (citing Commonwealth ex rel. Finken v. Roop, 339 A.2d 764 (Pa. Super. Ct. 1975); Doremus v. Farrell, 407 F. Supp. 509 (D. Neb. 1975); Stamus v. Leonhardt, 414 F. Supp. 439 (S.D. Iowa 1976)).

¹² See *id.* at 573 (“Several courts have refused to adopt an overt dangerous behavior requirement.”).

¹³ 422 U.S. 563, 576, 582-83 (1975) (citing Minnesota ex rel. Pearson v. Probate Court of Ramsey County, 309 U.S. 270 (1940); Jacobson v. Massachusetts, 197 U.S. 11, 25-29 (1905)).

¹⁴ *Id.* at 576.

¹⁵ See Groethe, *supra* note 8, at 568 (Alabama, California, Hawaii, Massachusetts, Nebraska, North Carolina, Washington and Wisconsin all reformed their civil commitment statutes within approximately one year of the *O'Connor* decision); David T. Simpson, Jr., *Involuntary Civil Commitment: The Dangerousness Standard and Its*

overt act or threat was required in order to establish such a finding.¹⁶

III. GUN LEGISLATION TARGETING MENTAL ILLNESS PRIOR TO 2013

Despite the rich history in this country of limiting the physical liberty of those who are deemed mentally unsound, the concept of prohibiting gun possession by the mentally ill is relatively new. Congress first specifically addressed the sale of firearms to the mentally ill with the Gun Control Act of 1968.¹⁷ The legislature drafted this sweeping gun control legislation in response to the 1968 assassination of Senator Robert Kennedy.¹⁸ The Act criminalizes the sale of firearms to a person where there is reasonable cause to believe that such person “has been adjudicated as a mental defective or has been committed to any mental institution.”¹⁹ It also prohibits people who have been adjudicated as mentally defective or involuntarily committed from shipping, transporting, possessing, or receiving any firearm “shipped or transported in interstate” commerce.²⁰ Federal courts have established that federal jurisdiction is sufficiently established under the Act where the government can demonstrate that the firearm in question is possessed in a state other than the one in which it was manufactured.²¹ Courts have applied this rule even where mere components of firearms or ammunition were manufactured in foreign states.²² Thus, contemporary firearms almost

Problems, 63 N.C. L. REV. 241, 246 (1984) (“To avoid having their state procedure declared unconstitutional, most state legislatures established dangerousness as the criterion for commitment of the mentally ill.”).

¹⁶ See generally Groethe, *supra* note 8.

¹⁷ Michael A. Bellesiles, *Firearms Regulation: A Historical Overview*, 28 CRIME & JUST. 137, 179 (2001) (“In addition to banning the interstate shipment of guns and ammunition, the act also ended the sale of firearms to minors, drug addicts, convicted felons, and mental incompetents.”) (internal citations omitted).

¹⁸ Jason Sterzer, *The Good, The Bad and the Ugly: A 50-State Survey Exploring Federal and State Firearm Regulations Related to Mental Health*, 33 J. LEGAL MEDICINE 171, 174 (2012).

¹⁹ 18 U.S.C. § 922(d)(4) (2012).

²⁰ 18 U.S.C. § 922(g)(4) (2012).

²¹ See, e.g., *United States v. Corey*, 207 F.3d 84, 88 (1st Cir. 2000) (citing *United States v. Coleman*, 22 F.3d 126, 130 (7th Cir. 1994); *United States v. Gourley*, 835 F.2d 249, 251 (10th Cir. 1987)).

²² See, e.g., *United States v. Mosby*, 60 F.3d 454, 457 (8th Cir. 1995) (finding that defendant possessed ammunition transported in interstate commerce where

always fall under the Act.²³

Following the attempted assassination of President Reagan and his Press Secretary, James Brady, Congress enacted the Brady Handgun Violence Prevention Act (“Brady Act”) in 1993.²⁴ The Brady Act established a national waiting period before a person could purchase a handgun, and created the National Instant Criminal Background Check System (“NICS”).²⁵ NICS is a database containing information such as mental health records voluntarily submitted by state and federal agencies and mental health histories.²⁶

Gun control laws at the state level also typically target mental illness. In fact, as of this writing, only five states have *not* enacted gun control laws pertaining to mental illness.²⁷ The remaining forty-six states’ laws, including the District of Columbia, vary in degree with regard to restrictions for the mentally ill. Even states with generally permissible gun control schemes may enforce regulations upon the mentally ill that meet or exceed the federal baseline set by the Gun Control Act of 1968. For instance, although Arizona was recently ranked first in Guns & Ammo Magazine’s *The Best States for Gun Owners* list, its 2012 statute mimics the federal standard by criminalizing the possession of firearms by any person “[w]ho has been found to constitute a danger to self or to others or to be persistently or acutely disabled or gravely disabled pursuant to court order under [Arizona’s commitment statute]. . .”²⁸ Georgia, which

Minnesota defendant possessed ammunition assembled in Minnesota, but composed of some parts manufactured outside of Minnesota).

²³ See Barbara H. Taylor, Case Note, *Close Enough For Government Work: Proving Minimal Nexus in a Federal Firearms Conviction*: United States v. Corey, 56 ME. L. REV. 187, 20406 (2004).

²⁴ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

²⁵ *Id.*

²⁶ Lindsey Lewis, *Mental Illness, Propensity for Violence, and the Gun Control Act*, 11 HOUS. J. HEALTH L. & POL’Y 149, 162 (2011).

²⁷ These states are Alaska, Alabama, Kentucky, New Hampshire, and Vermont; see Sterzer, *supra* note 18, at 181; see also *Possession of a Firearm by the Mentally Ill*, NAT’L CONF. OF STATE LEGIS. (Jan. 2013), <http://www.ncsl.org/issues-research/justice/possession-of-a-firearm-by-the-mentally-ill.aspx>.

²⁸ ARIZ. REV. STAT. ANN. § 13-3101(A)(7)(a) (LexisNexis 2013); James Tarr, *Laws for Firearms: Best States for Gun Owners in 2013*, GUNS & AMMO (Mar. 14, 2013), <http://www.gunsandammo.com/2013/03/14/ga-ranks-the-best-states-for-gun-owners-in-2013/>

ranked thirteenth on the Guns & Ammo list, exceeds the federal baseline in its 2011 statute by prohibiting the granting of a firearms license to anyone “who has been hospitalized as an inpatient in any mental hospital or alcohol or drug treatment center within the five years immediately preceding the application.”²⁹ However, recent events have inspired new gun control legislation that introduces new issues and challenges for the mentally ill.

A. *Recent Mass Shootings*

An aggregation of horrific mass shootings in the United States has ignited intense debate about gun violence and its association with mental illness, and has accordingly inspired proposals for new gun control legislation. Since 2007, six shooting incidents in the United States have resulted in injuries and deaths totaling fifteen or more victims.³⁰ In each instance, the media substantially focused upon the mental health of the perpetrator, and the means by which he gained access to firearms he used.

a. *Virginia Tech*

On April 16, 2007, Seung-Hui Cho, an English major at Virginia Polytechnic Institute (“Virginia Tech”), shot and killed thirty-three people, including himself, and injured at least fifteen others on the Virginia Tech campus.³¹ Prior to the shooting, Cho had sought mental health treatment from the University’s counseling center, had been admitted to a psychiatric hospital, and had been involuntarily committed to outpatient treatment after threatening to commit suicide.³² He displayed symptoms of depression, had “episodes of

²⁹ GA. CODE ANN., § 16-11-129(b)(2)(J) (West 2011); Tarr, *supra* note 28.

³⁰ As of early 2013, there have been a total of twenty-two mass shootings in the United States since 2007. This paper focuses upon the six events that garnered the most national attention and, accordingly, had the clearest influence upon firearms legislation; see Mark Follman et al., *A Guide to Mass Shootings in America*, MOTHER JONES (Feb. 27, 2013, 7:45 AM), <http://www.motherjones.com/politics/2012/07/mass-shootings-map?page=2> (containing a complete timeline of United States mass shootings since 1982).

³¹ Christine Hauser, *Virginia Gunman Identified as a Student*, N.Y. TIMES (Apr. 17, 2007), <http://www.nytimes.com/2007/04/17/us/17virginia.html?ref=virginiapolytechnicinstituteandstateuniversity>.

³² Brigid Schulte & Tom Jackman, *Tech Gunman’s Records Reveal Lack of Treatment*,

panic and anxiety[,] and was engaging in self-destructive behavior.”³³ Cho used a Walther P22 pistol, which he purchased legally from an out-of-state dealer.³⁴ He also used a Glock 19 pistol, which he purchased legally from a gun dealer in Virginia.³⁵

b. Northern Illinois University

On February 14, 2008, Steven Kazmierczak shot and killed five students and injured sixteen others in a lecture hall at Northern Illinois University, and then killed himself.³⁶ Kazmierczak was a former student at the university and had previously been prescribed anti-depressant medication.³⁷ He used four guns in the shooting: a Remington shotgun, a Glock 9mm handgun, a Hi-point .380 handgun, and a Sig Sauer handgun.³⁸ He purchased all of the firearms legally from a gun store in Champaign, Illinois.³⁹

c. Fort Hood

On November 5, 2009, an Army psychiatrist named Nidal Malik Hasan shot and killed thirteen people and wounded thirty others at the Fort Hood Army post in Texas.⁴⁰ Hasan had been suspected of being mentally unstable, but apparently had not been treated for any

WASH. POST (Aug. 20, 2009), http://articles.washingtonpost.com/2009-08-20/news/36824322_1_triage-mental-health-records-seung-hui-cho.

³³ *Id.*

³⁴ Drew Griffin, et al., *Campus Killer's Purchases Apparently within Gun Laws*, CNN (Apr. 19, 2007, 5:48 AM), <http://www.cnn.com/2007/US/04/19/gun.laws/>.

³⁵ *Id.*

³⁶ Susan Saulny & Monica Davey, *Gunman Slays 6 at N. Illinois University*, N.Y. TIMES, Feb. 15, 2008, available at <http://www.nytimes.com/2008/02/15/us/15shoot.html?ref=schoolshooting&r=0>; Benedict Carey, *Reports of Gunman's Use of Antidepressant Renew Debate Over Side Effects*, N.Y. TIMES (Feb. 19, 2008), <http://www.nytimes.com/2008/02/19/us/19depress.html?ref=schoolshooting>.

³⁷ See David Vann, *Portrait of the School Shooter as a Young Man*, ESQUIRE (Feb. 12, 2009, 6:27 PM), <http://www.esquire.com/features/steven-kazmierczak-0808>.

³⁸ See Mike Stuckey et al., *College shooter's deadly rampage baffles friends*, NBC NEWS (Feb. 16, 2008, 2:58 PM), http://www.nbcnews.com/id/23171567/ns/us_news-crime_and_courts/t/college-shooters-deadly-rampage-baffles-friends/#.UYE7gCt4abw.

³⁹ *Id.*

⁴⁰ Robert D. McFadden, *Army Doctor Held in Ft. Hood Rampage*, N.Y. TIMES (Nov. 5, 2009), <http://www.nytimes.com/2009/11/06/us/06forthood.html?ref=nidalmalikhasan>.

mental illness.⁴¹ He perpetrated the shooting using an FN Five-Seven, a semi-automatic pistol that he legally purchased at a gun store near the post.⁴²

d. Tucson

On January 8, 2011, Jared Lee Loughner shot and killed six people, and injured at least seventeen others.⁴³ The shooting took place outside of a supermarket in Tucson, Arizona, where U.S. Representative Gabrielle Giffords was meeting with constituents.⁴⁴ Loughner was a former student at Pima Community College in Tucson, where his odd behavior caused concern amongst classmates and faculty and eventually led to his expulsion.⁴⁵ He was known to have abused narcotics excessively, but was not treated for any mental illness before the shooting.⁴⁶ After the incident, Loughner was diagnosed with paranoid schizophrenia and was found incompetent to stand trial.⁴⁷ Loughner perpetrated the shooting using a Glock 19 semiautomatic pistol, which he legally purchased from a sporting goods store in Tucson.⁴⁸

⁴¹ See Daniel Zwerdling, *Walter Reed Officials Asked: Was Hasan Psychotic?*, NPR NEWS (Nov. 11, 2009), <http://www.npr.org/templates/story/story.php?storyId=120313570>.

⁴² Nick Allen, *Fort Hood Shootings: Gunman Used 'Cop Killer' Weapon In Massacre at US Army Base*, THE TELEGRAPH (Nov. 7, 2009), <http://www.telegraph.co.uk/news/worldnews/northamerica/usa/6519392/FortHood-shootings-gunman-used-cop-killer-weapon-in-massacre-at-US-Army-base.html>.

⁴³ Gabrielle Giffords, U.S. Representative, was among those injured. John M. Roll, Chief Judge for the United States District Court, District of Arizona, was among those killed. See Marc Lacey & David M. Herszenhorn, *In Attack's Wake, Political Repercussions*, N.Y. TIMES (Jan. 8, 2011), <http://www.nytimes.com/2011/01/09/us/politics/09giffords.html?ref=politics>.

⁴⁴ *Id.*

⁴⁵ See Kirk Johnson, et al., *Suspect's Odd Behavior Caused Growing Alarm* N.Y. TIMES (Jan. 9, 2011), <http://www.nytimes.com/2011/01/10/us/10shooter.html?pagewanted=all>.

⁴⁶ See John Cloud, *The Troubled Life of Jared Loughner*, TIME (Jan. 15, 2011), <http://www.time.com/time/magazine/article/0,9171,2042358-2,00.html>.

⁴⁷ Marc Lacey, *Suspect in Shooting of Gifford Ruled Unfit for Trial*, N.Y. TIMES (May 25, 2011), <http://www.nytimes.com/2011/05/26/us/26loughner.html>.

⁴⁸ Susanna Kim, *Glock 19: How Did Unemployed Jared Loughner Buy Popular, Expensive Pistol?*, ABC NEWS (Jan. 11, 2011), <http://abcnews.go.com/Business/questions-remain-jared-loughner-paid-expensive->

e. Aurora

On July 20, 2012, James Holmes shot and killed twelve people and injured fifty-eight others inside a multiplex movie theater in Aurora, Colorado.⁴⁹ Holmes, a Neuroscience doctorate student at the University of Colorado, had met with at least three mental health professionals at the university prior to the shooting.⁵⁰ A psychiatrist who treated him at the university had also warned a threat assessment team at the University that she believed that he might be a threat to others, but the University did not take any subsequent action.⁵¹ Although no information has yet been released concerning his diagnosis, Holmes's attorneys described him as mentally ill and suggested that they intend to focus on his mental state in his defense.⁵² Holmes used three weapons in the shooting: a Smith & Wesson M&P-15s semiautomatic rifle, a Remington 870 pump-action shotgun, and Glock .40 caliber semiautomatic pistol.⁵³ He purchased all of the weapons legally.⁵⁴

f. Sandy Hook

On December 14, 2012 in Newtown, Connecticut, Adam Lanza shot and killed his mother in her home, and then twenty children and six adults at the Sandy Hook Elementary School.⁵⁵ Lanza then

firearm/story?id=12585290#.UYFJMyt4abw.

⁴⁹ Dan Frosch & Kirk Johnson, *Gunman Kills 12 in Colorado, Reviving Gun Debate*, N.Y. TIMES (July 20, 2012), <http://www.nytimes.com/2012/07/21/us/shooting-at-colorado-theater-showing-batman-movie.html?ref=jamesholmes>.

⁵⁰ Rick Sallinger, *James Holmes Saw Three Mental Health Professionals Before Shooting*, CBS NEWS (Aug. 21, 2012), http://www.cbsnews.com/8301-201_162-57497820/james-holmes-saw-three-mental-health-professionals-before-shooting/.

⁵¹ Michael McLaughlin, *James Holmes' Psychiatrist Warned University of Colorado He Might Be a Threat*, HUFFINGTON POST (Aug. 1, 2012), http://www.huffingtonpost.com/2012/08/01/james-holmes-psychiatrist-threat_n_1731051.html.

⁵² Jack Healy, *Death Penalty is Sought in Shooting at Colorado Theater*, N.Y. TIMES (Apr. 1, 2013), <http://www.nytimes.com/2013/04/02/us/prosecutors-seek-death-penalty-against-james-holmes.html>.

⁵³ James Dao, *Aurora Gunman's Arsenal: Shotgun, Semiautomatic Rifle and, at the End, a Pistol*, N.Y. TIMES (July 23, 2012), <http://www.nytimes.com/2012/07/24/us/aurora-gunmans-lethal-arsenal.html>.

⁵⁴ *Id.*

⁵⁵ David M. Halbfinger, *A Gunman, Recalled as Intelligent and Shy, Who Left Few Footprints in Life*, N.Y. TIMES (Dec. 14, 2012),

killed himself.⁵⁶ Lanza is believed to have been diagnosed with Asperger's Syndrome, although no diagnosis has yet been officially confirmed, and there is no other evidence that he was ever treated for any psychological condition.⁵⁷ Lanza used three weapons in the elementary school shooting: a Bushmaster AR-15 rifle, a Glock 10mm handgun, and a Sig Sauer 9mm handgun.⁵⁸ All of the guns were purchased legally by Lanza's mother, a gun enthusiast and firearms collector.⁵⁹

IV. NEW YORK'S SAFE ACT

Individually and cumulatively, the mass shootings between 2007 and 2013, inspired gun control legislation on both federal and state levels that attempted to restrict the mentally ill from access to firearms. The Virginia Tech shooting specifically motivated Congress to pass the NICS Improvement Amendments Act of 2007, which provided that states should notify the Attorney General when a person has been adjudicated as a mental defective, or involuntarily committed pursuant to the Gun Control Act of 1968.⁶⁰ The NICS Improvement Amendments Act also implemented other methods to improve access to mental health records for the purposes of qualification for gun licensure.⁶¹ Prior to the 2007 legislation, the NICS database accounted for approximately .09 percent of the estimated total population of involuntary committees in the United States, and only twenty-two states had contributed any mental health

<http://www.nytimes.com/2012/12/15/nyregion/adam-lanza-an-enigma-who-is-now-identified-as-a-mass-killer.html>.

⁵⁶ *Id.*

⁵⁷ N.R. Kleinfeld et al., *Newtown Killer's Obsessions, in Chilling Detail*, N.Y. TIMES (Mar. 28, 2013), <http://www.nytimes.com/2013/03/29/nyregion/search-warrants-reveal-items-seized-at-adam-lanzas-home.html?pagewanted=all>.

⁵⁸ Steve Almasy, *Newtown Shooter's Guns: What We Know*, CNN (Dec. 19, 2012), <http://www.cnn.com/2012/12/18/us/connecticut-lanza-guns>.

⁵⁹ Matt Flegenheimer, *A Mother, a Gun Enthusiast and the First Victim*, N.Y. TIMES (Dec. 15, 2012), <http://www.nytimes.com/2012/12/16/nyregion/friends-of-gunmans-mother-his-first-victim-recall-her-as-generous.html>.

⁶⁰ NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, § 101(b)(2)(C)(ii) (2008) (codified at 18 U.S.C. § 922 (2008)).

⁶¹ See NICS Improvement Amendments Act § 2(9) ("In spite of a proven history of mental illness, the shooter was able to purchase two firearms used in the shooting. Improved coordination between State and Federal authorities could have ensured that the shooter's disqualifying mental health information was available to NICS.").

records to the database.⁶² The NICS Improvement Amendments Act limited the scope of the notification requirements to records of “any person who has been adjudicated as a mental defective or who has been committed to a mental institution.”⁶³

The Tucson and Aurora shootings both caused significant outrage among gun control advocates, but efforts to push Congress toward further reform seemed to fall short.⁶⁴ Following each of those events, Senator Frank Lautenberg of New Jersey introduced a bill that would restrict magazine capacities, but the bill gained little support in both instances.⁶⁵ However, the elementary school mass shooting at Sandy Hook galvanized the gun control efforts born of the prior shootings, and state and federal legislators began to consider substantial gun control legislation in the immediate aftermath of the Sandy Hook massacre.⁶⁶ At the same time, mental health and gun control were becoming closely interwoven concepts in the mass media, as well as in statements made by the National Rifle Association and the White House.⁶⁷ The first gun control legislation to become

⁶² See Lewis, *supra* note 26, at 162 (“At the end of 2005, the NICS had over 234,000 records for people with disqualifying mental health histories. Yet in January 2006, there was an estimated 2.7 million people who had been involuntarily committed for mental health disorders.” (footnote omitted)).

⁶³ See NICS Improvement Amendments Act, *supra* note 60, at § 3(2) (referencing 18 U.S.C. 922(g)(4)).

⁶⁴ See Perry Bacon Jr., *Gun-Control Advocates Press White House for Stricter Laws After Tucson Shooting*, WASH. POST (Jan. 21, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/21/AR2011012101976.html>; Rick Jervis, *Gun Control Advocates Target High-Capacity Magazines*, USA TODAY (July 31, 2012), <http://usatoday30.usatoday.com/news/nation/story/2012-07-31/gun-control-colorado-theater-shooting/56621536/1>; Amy Gardner, *Aurora, Colo., Shooting Unlikely to Change Gun Laws, Both Sides Say*, WASH. POST (July 20, 2012), http://articles.washingtonpost.com/2012-07-20/politics/35487563_1_brady-campaign-gun-control-advocates-gun-industry; Andrew Rosenthal, *A Gun For Every Person*, N.Y. TIMES TAKING NOTE (July 23, 2012), <http://takingnote.blogs.nytimes.com/2012/07/23/a-gun-for-every-person/>.

⁶⁵ See Sahil Kapur, *Frank Lautenberg Revives Gun Control Bill Post Aurora*, TPM (July 22, 2013), <http://tpmdc.talkingpointsmemo.com/2012/07/frank-lautenberg-gun-control-assault-weapons-ban-aurora-colorado-shooting.php>

⁶⁶ See John Rudolf & Katie Bindley, *Gun Control Bills Flood Statehouses in Wake of Sandy Hook Shooting*, HUFFINGTON POST, Jan. 19, 2013, http://www.huffingtonpost.com/2013/01/19/gun-control-bills_n_2507219.html (discussing the Tucson and Aurora shootings that have “galvanized lawmakers and the public on the issue of guns”).

⁶⁷ See, e.g., Joe Nocera, *Guns and Mental Illness*, N.Y. TIMES (Dec. 28, 2012),

law after Sandy Hook was in New York, when Governor Andrew Cuomo signed the New York Secure Ammunition and Firearms Enforcement Act of 2013 (“SAFE Act”) just thirty-two days after the shooting.⁶⁸

The SAFE Act included several provisions directly pertaining to mental illness, some of which were unprecedented in their requirements for mental health professionals and prohibitions for the mentally ill. Under the SAFE Act, mental health professionals are required to report to the state whenever they determine that a person to whom they are providing services “is likely to engage in conduct that would result in serious harm to self or others.”⁶⁹ The SAFE Act applies to physicians, psychologists, licensed clinical social worker, and registered nurses, and does not specify that “mental health professionals” must be providing services pertaining to mental health treatment in order for the provisions to apply.⁷⁰ Mental health professionals are specifically required to report to their local Director of Community Services (“DCS”).⁷¹ The sole exception to the reporting requirement is where the mental health professional has determined that the report would endanger him or herself, or

<http://www.nytimes.com/2012/12/29/opinion/nocera-guns-and-mental-illness.html?ref=schoolshootings>; *Remarks from the NRA Press Conference on Sandy Hook School Shooting, Delivered on Dec. 21, 2012*, WASH. POST. (Dec. 21, 2012), http://articles.washingtonpost.com/2012-12-21/politics/36018141_1_mayhem-with-minimum-risk-nra-wayne-lapierre (“A dozen more killers, a hundred more? How can we possibly even guess how many, given our nation’s refusal to create an active national database of the mentally ill?”); Sam Stein & Christina Wilkie, *Obama Speaks at Sandy Hook Vigil: ‘These Tragedies Must End’*, HUFFINGTON POST (Dec. 16, 2012), http://www.huffingtonpost.com/2012/12/16/obama-speaks-at-sandy-hoo_n_2312869.html.

⁶⁸ See David Ariosto, *N.Y. Governor Signs Nation’s First Gun-Control Bill Since Newtown*, CNN (Jan. 28, 2013), <http://www.cnn.com/2013/01/15/us/new-york-gun-bill>; *Governor Cuomo Signs NY Safe Act in Rochester* (Jan. 16, 2013), <http://www.governor.ny.gov/press/12162013cuomo-signs-safe-act-roch>.

⁶⁹ N.Y. MENTAL HYG. LAW § 9.46 (2012).

⁷⁰ *Id.*

⁷¹ *Id.* A “Director of Community Services” is a locally-appointed mental health professional who controls the provision of mental health services in a New York county (or New York City) and sits on the State Conference of Local Mental Hygiene Directors. See N.Y. MENTAL HYG. LAW §§ 41.01 et seq.; *About Us*, New York State Conference of Local Mental Hygiene Directors, Inc., http://www.clmhd.org/about_us/.

increase danger to potential victims.⁷²

When a DCS receives a report from a mental health professional, and agrees that the person in question is likely to engage in unsafe conduct, the DCS must report only the name of the person and “other non-clinical identifying information” to the Division of Criminal Justice Services (“DCJS”).⁷³ When the DCJS receives this information from a DCS, it must determine whether the person possesses a firearm permit.⁷⁴ If the person in question has in fact been issued a permit, DCJS must report his or her name to the appropriate licensing official, who must then issue an order either suspending or revoking that individual’s firearm license.⁷⁵ When a person’s license has been revoked pursuant to this scheme, he or she must surrender the license and all firearms, rifles, or shotguns he or she owns or possesses by them.⁷⁶ In the event that the individual fails to surrender these items, the statute authorizes the police to must “seize forthwith any rifle or shotgun possessed by such person.”⁷⁷

The SAFE Act also instructs that courts must revoke any firearm license possessed by a person upon entry of a verdict of not guilty by reason of mental disease or defect, or upon a finding that such person lacks competency to stand trial.⁷⁸ Courts must then inquire of the defendant as to their ownership or possession of any firearms, and the locations of which where applicable, and direct their surrender.⁷⁹

Prior to the SAFE Act, New York law prohibited the issuance of a firearms license to a person who had failed to state whether he or she had ever suffered any mental illness, but the SAFE Act added three further bars to firearm licensure affecting the mentally ill.⁸⁰ Licenses are now explicitly unavailable to three types of people: (1) persons who have ever been involuntarily committed to mental health facilities as mentally ill patients; (2) persons who have been

⁷² N.Y. MENTAL HYG. LAW § 9.46.

⁷³ *Id.*

⁷⁴ N.Y. PENAL LAW § 400.00 (2012).

⁷⁵ N.Y. PENAL LAW § 400.00(11)(b).

⁷⁶ *Id.*

⁷⁷ N.Y. PENAL LAW § 400.00(11)(c).

⁷⁸ N.Y. CRIM. PROC. LAW § 330.20(2)(a) (2012).

⁷⁹ *Id.*

⁸⁰ N.Y. PENAL LAW § 400.00 (1)(j).

committed to specialized schools as developmentally disabled persons and in need of involuntary care and treatment; and (3) persons who have been appointed a guardian pursuant to any provision of New York law, based upon a determination that such person lacks the mental capacity to manage his or her own affairs due to marked subnormal intelligence, mental illness, incapacity, condition, or disease.⁸¹ Pursuant to these changes, the SAFE Act also modified the law concerning the sharing of mental health and criminal records between state agencies. The Commissioner of Mental Health is now required to transmit to the Division of Criminal Justice and to the Federal Bureau of Investigation the identities of persons who have been appointed a guardian based upon the above determinations, and of persons who have been involuntarily committed.⁸²

A. New York Mental Hygiene Law Section 9.46: The Reporting Requirement for Mental Health Professionals

In general, the SAFE Act's requirement that mental health professionals report perceived dangers to third parties is not, by any means, unprecedented. Many states also either allow or require medical and mental health professionals to breach their duty of confidentiality by taking some kind of preventative action when they determine, in the regular course of treatment, that a patient is dangerous.⁸³ The leading reference case for the disclosure duty is *Tarasoff v. Regents of University of California* from the California Supreme Court in 1976.⁸⁴ *Tarasoff* was a wrongful death action arising

⁸¹ See *id.*; N.Y. MENTAL HYG. LAW § 9.27 (2012); See N.Y. PENAL LAW § 400.00(1)(j); N.Y. MENTAL HYG. LAW § 15.27(a) N.Y. PENAL LAW § 400.00(1)(m).

⁸² N.Y. MENTAL HYG. LAW § 13.09(g)(1)(i)-(ii).

⁸³ Communications between therapists and patients are generally confidential, and cannot be disclosed to third parties without the patient's consent. See 61 AM. JUR. 2D *Physicians, Surgeons, and Other Healers* § 143 (2013); 81 AM. JUR. 2D *Witnesses* § 427 (2013) ("A requisite of the privileged status of psychotherapist-patient communications is that they be confidential, confidentiality being an essential ingredient of successful psychotherapy").

⁸⁴ 551 P.2d 334 (1976). See *Currie v. United States*, 644 F. Supp. 1074, 1077 (M.D.N.C. 1986) ("[*Tarasoff*] is the seminal case in this area, and the case from which all courts examining a duty to commit have begun their examination"); *Emerich v. Philadelphia Ctr. for Human Dev.*, 720 A.2d 1032, 1036 (Pa. 1998) (stating that an analysis of whether mental health professional had duty to warn a third party of potential harm by his patient "must begin with the California Supreme Court's landmark decision in *Tarasoff* . . .").

from the murder of Tatiana Tarasoff by Prosenjit Poddar.⁸⁵ Two months before the murder, Poddar disclosed to his psychologist that he intended to kill Tarasoff.⁸⁶ Tarasoff's parents brought suit against the psychologist and his employer, alleging that the psychologist had a duty to warn Tarasoff of Poddar's intent.⁸⁷ The court found that:

[w]hen a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against danger. The discharge of this duty may require the therapist to take one or more various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of danger, to notify police, or to take whatever other steps are reasonably necessary under the circumstances.⁸⁸

By 2010, forty-three states and the District of Columbia had adopted, either by common law or statute, an exception to the duty of confidentiality for mental health professionals who believe that their patients/clients present a danger to themselves or others.⁸⁹ In the same way that civil commitment laws vary by state with respect to the issue of overt acts or other evidence of dangerousness, the *Tarasoff* laws vary state by state with respect to the concept of dangerousness, and how it might be prevented. A brief examination of these different concepts will show that New York's SAFE Act has extended the *Tarasoff* duty far beyond the statutory scheme in any other state.

1. Differing Standards for the Circumstances Under Which Mental Health Professionals Must Report

There is no clear standard across all states for the level of

⁸⁵ *Tarasoff*, 551 P.2d at 339. The criminal prosecution stemming from this crime is reported in *People v. Poddar*, 518 P.2d 342 (1974).

⁸⁶ *Tarasoff*, 551 P.2d 334 at 339.

⁸⁷ *See id.*

⁸⁸ *Id.* at 340.

⁸⁹ *See* GRIFFIN S. EDWARDS, DATABASE OF STATE *TARASOFF* LAWS (Feb. 11, 2010), available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551505 (With the exceptions of Arkansas, Kansas, Maine, Nevada, New Mexico, North Dakota, and Virginia.).

perceived danger that necessitates a *Tarasoff* report, or for the immediacy or specificity of a perceived threat. Some states require warnings only in very specific and extreme situations. For example, *Tarasoff* liability in Arizona is only triggered when a patient has communicated to a mental health provider “an explicit threat of imminent serious physical harm or death to a clearly identified or identifiable victim or victims, and [where] the patient has the apparent intent and ability to carry out such threat.”⁹⁰ Connecticut, by contrast, has a looser standard; mental health professionals are statutorily authorized to disclose confidential communications where they believe “in good faith that there is a risk of imminent personal injury to the [patient] or other individuals or risk of imminent injury to the property of other individuals,” although disclosure is not explicitly required.⁹¹ Nebraska’s statute is even less specific, requiring only “a serious threat of physical violence against a reasonably identifiable victim or victims.”⁹² In Rhode Island, which, like Connecticut, only has a discretionary warning, a mental health professional is permitted to disclose confidential information to law enforcement or a third person, “if the [mental health professional] believes that person or his or her family is in danger from a patient.”⁹³

In general, there are three easily identifiable factors that are common to the threat parameters in *Tarasoff* statutes. Aside from New York’s SAFE Act, every state’s statutory scheme implements at least one of these factors. The first factor is that the threat must describe a specific act, activity, or result. Statutes commonly require that a patient specifically *threaten* to cause *physical violence*, *serious harm*, or *death*.⁹⁴ The second factor is that the perceived harm or danger be *clear and present*, *imminent*, or *immediate*.⁹⁵ The third factor is that where

⁹⁰ ARIZ. REV. STAT. ANN. § 36-517.02(A)(1) (2013) (LexisNexis 2013).

⁹¹ CONN. GEN. STAT. ANN. § 52-146c(c)(3) (LexisNexis 2013).

⁹² NEB. REV. STAT. ANN. § 38-3132(1) (LexisNexis 2013).

⁹³ R.I. GEN. LAWS § 5-37.3-4(b)(4) (LexisNexis 2013).

⁹⁴ See, e.g., CAL. CIV. CODE § 43.92(a) (LexisNexis 2013) (requiring a “serious threat of physical violence”); IDAHO CODE ANN. § 6-1902 (LexisNexis 2013) (requiring “an explicit threat of imminent serious physical harm or death”); KY KY. REV. STAT. ANN. § 202A.400(1) (LexisNexis 2013) (requiring “an actual threat of physical violence”); MINN. STAT. ANN. § 148.975(Subd. 2) (LexisNexis 2013) (requiring “specific, serious threat of physical violence”).

⁹⁵ This appears to be the most common factor, however, some exceptions exist. See KY. REV. STAT. § 202A.400(1) (LexisNexis 2013) (requiring “an actual threat of

the threat is directed towards parties other than the patient, it must be towards a specific, *identifiable* or *easily identifiable* individual or individuals.⁹⁶

The SAFE Act created the first *Tarasoff* statute that disregards each one of these three factors. The SAFE Act compels disclosure where a “person is likely to engage in conduct that would result in serious harm to self or others.”⁹⁷ This language does not incorporate the first threat factor because *conduct that would result in serious harm* does not even require a threat, let alone any specific activity. The SAFE Act language also does not square with the second threat factor, because it does not suggest that the *serious harm* must be imminent, clear and present, or immediate. The third factor is also not fulfilled, because the term “others” does not in any way suggest that parties other than the patient be specifically identifiable. The SAFE Act therefore requires mental health professionals to disclose confidential information even where their patients have not made any threat, there is no imminent danger and circumstances do not justify emergency measures, and no identifiable person other than the patient is endangered.

physical violence against a clearly identified or reasonably identifiable victim, or . . . an actual threat of some specific violent act.”); LA REV. STAT. 9:2800.20(A) (LexisNexis 2013) (requiring “a threat of physical violence . . . against a clearly identified victim or victims, coupled with the apparent intent and ability to carry out such threat.”); MINN. STAT. ANN. § 148.975 (Subd. 2) (LexisNexis 2013) (requiring “a specific, serious threat of physical violence against a specific, clearly identified or identifiable potential victim.”); MISS. CODE ANN. § 41-21-97 (LexisNexis 2013) (requiring “an actual threat of physical violence against clearly identified or reasonably identifiable potential victim or victims.”); MCA 27-1-1102 (LexisNexis 2013) (requiring “an actual threat of physical violence by specific means against a clearly identified or reasonably identifiable victim.”); N.H. REV. STAT. § 329.31(I) (LexisNexis 2013) (requiring “a serious threat of physical violence against a clearly identified or reasonably identifiable victim or victims, or a serious threat of substantial damage to real property.”); TENN. CODE ANN. § 33-3-206(1) (LexisNexis 2013) (requiring “an actual threat of bodily harm against a clearly identified victim.”); UTAH CODE ANN. § 78B-3-502(1) (LexisNexis 2013) (requiring “an actual threat of physical violence against a clearly identified or reasonably identifiable victim.”); WASH. REV. CODE § 71.05.120(2) (LexisNexis 2013) (requiring “an actual threat of physical violence against a reasonably identifiable victim or victims.”).

⁹⁶ See, e.g., ALASKA STAT. § 08.86.200(a)(3) (2013) (“identifiable victim”); IDAHO CODE ANN. § 6-1902 (2013) (“clearly identified or identifiable victim or victims”); LA. REV. STAT. ANN. § 9:2800.2(A) (2012) (“clearly identified victim or victims”).

⁹⁷ N.Y. MENTAL HYG. LAW § 9.46(b) (2013) (emphasis added).

2. Differing Standards Concerning the Content of a Report, and to Whom it Must be Directed

In some states, whether mental health professionals must report perceived dangers is left to their individual discretion.⁹⁸ Where a warning is mandatory, states vary widely with respect to the content of the warning and to whom it must be made. As discussed above, the *Tarasoff* case suggested that mental health professionals may be required to “warn the intended victim or others likely to apprise the victim of danger, to notify police, or to take whatever other steps are reasonably necessary under the circumstances.”⁹⁹ Many states require mental health professionals to notify law enforcement agencies in some manner when they perceive a situation to be dangerous.¹⁰⁰ While many statutes and court decisions compel notification to law enforcement of the perceived danger to the potential victim, none explicitly require disclosure of the patient’s identity. Some states specify that mental health professionals may disclose the identity of a patient, but offer alternative means to discharge their duty.¹⁰¹ The New York SAFE Act creates the first *Tarasoff* statute to explicitly

⁹⁸ See ALASKA STAT. § 08.86.200(a)(3) (“A psychologist . . . may not reveal [confidential information]. This section does not apply to . . . a case where an immediate threat of serious physical harm to an identifiable victim is communicated”); FLA. STAT. § 491.0147(3) (LexisNexis 2013) (“Any communication between [mental health professional] and her or his client shall be confidential. This secrecy may be waived . . . when . . . there is a clear and immediate probability of physical harm to the patient or client, to other individuals, or to society.”); OR. REV. STAT. ANN. § 179.505(12) (LexisNexis 2013) (“Information obtained in the course of diagnosis, evaluation, or treatment of an individual that, in the professional judgment of the health care services provider, indicates a clear and immediate danger to others or to society may be reported to the appropriate authority.”).

⁹⁹ *Tarasoff*, 551 P.2d at 340.

¹⁰⁰ See COLO. REV. STAT. ANN. § 13-21-117 (2013) (“[T]he duty shall be discharged by . . . making reasonable and timely efforts to notify any person or persons specifically threatened, as well as notifying an appropriate law enforcement agency or by taking other appropriate action”); KY. REV. STAT. ANN. §202A.400 (LexisNexis 2013) (duty “to notify the police department closest to the patient’s and the victim’s residence of the threat of violence”); LA. REV. STAT. ANN. §9:2800.2 (duty “to communicate the threat to the potential victim . . . and to notify law enforcement authorities.”).

¹⁰¹ See, e.g., MD. CODE ANN., CTS. & JUD. PROC. § 5-609(c)(2)(i) (LexisNexis 2013) (therapists may “seek civil commitment;” “undertake a documented treatment plan calculated to eliminate [the threat];” or “inform the appropriate law enforcement agency . . . of . . . the identity of the patient making the threat”).

compel mental health professionals to disclose the identity of their clients to authorities.

3. The SAFE Act's Warning Requirement Interferes With Established Standards of Confidentiality

The SAFE Act's warning requirement fails to strike the appropriate balance between the competing interests of privacy and safety. The *Tarasoff* court was careful to note "the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy, and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication."¹⁰² The court found that these considerations should be overridden only "to the extent to which disclosure is *essential* to avert danger to others," and breaching confidentiality was only justified where a patient "presents a serious danger of violence" to a particular victim.¹⁰³

Some members of the mental health community have had trouble adjusting to the limited requirements of the *Tarasoff* decision, and argue that "[i]f one breaches confidentiality in order to warn a supposed intended victim or to initiate commitment, one ruptures the therapeutic relationship, which is the modality most likely to help the patient maintain control over his or her aggressive impulses."¹⁰⁴ *Tarasoff* forced therapists to devote more time to discussing confidentiality with their clients, to pay more attention to potential violence, and to over-predict violence because of their perceived responsibility to society.¹⁰⁵ A California survey conducted just two years after the *Tarasoff* opinion revealed that twenty-five percent of therapists observed reluctance in their patients to discuss violent tendencies because of their knowledge of the new *Tarasoff* duty.¹⁰⁶ Additionally, twenty-five percent reported an average loss of three patients who feared that their confidentiality would be breached as a

¹⁰² *Tarasoff*, 551 P.2d at 346.

¹⁰³ *Id.* at 345, 347 (emphasis added).

¹⁰⁴ Jerome S. Beigler, *Tarasoff v. Confidentiality*, 2 BEHAV. SCI. & L. 273, 277 (1984) (citing M. Grossman, *Confidentiality: The Right to Privacy Versus the Right to Know*, in LAW AND THE MENTAL HEALTH PROFESSION (W.E. Barton & C.J. Sanborn eds., 1978).

¹⁰⁵ Beigler, *supra* note 104, at 278.

¹⁰⁶ *Id.*

result of the new rule.¹⁰⁷ Mental health professionals have already raised similar concerns about the SAFE Act's reporting requirements.¹⁰⁸ The Federal Department of Veterans Affairs announced in March 2013, that its mental health professionals would not report information as directed by the Act, because federal confidentiality standards did not authorize their compliance.¹⁰⁹

By directing mental health professionals to report the likelihood of conduct, rather than the likelihood of harm, the SAFE Act's warning provisions require action without any analysis of the potential for actual danger, and will place mental health professionals in an even more contradictory position than the *Tarasoff* ruling. The SAFE Act's reporting requirement could cause therapists to take even broader precautions and over-report, further chilling more of those in need of help from pursuing it, and imposing an unprecedented burden upon the confidential relationship between mental health professionals and their patients.

B. New York Penal Law Section 400.00: The Revocation and Seizure Provisions

As discussed above, those who have been adjudicated mentally defective or involuntarily committed to a mental institution have been restricted from purchasing firearms by federal law since 1968.¹¹⁰ Therefore, the New York SAFE Act's prohibitions against the sale, purchase, or licensure of firearms to the mentally ill are not radical shifts from traditional gun control legislation. However, the Act introduces new precedents in the ways that information about mental

¹⁰⁷ See *id.*, at 277-78.

¹⁰⁸ See Assoc. Press, *Experts Fear Proposed N.Y. Gun Law Might Hinder Therapy*, USA TODAY (Jan. 15, 2013), <http://www.usatoday.com/story/news/nation/2013/01/15/ny-gun-law-therapy/1836323/>.

¹⁰⁹ See Assoc. Press, *VA Says It Won't Follow New Gun Law*, THE DAILY RECORD (March 11, 2013), <http://nydailyrecord.com/blog/2013/03/11/va-says-it-wont-follow-new-gun-law/>.

¹¹⁰ See 18 U.S.C. § 922(d)(4) (2012). See also *United States v. Dorsch*, 363 F.3d 784, 785 (8th Cir. 2004) (Discussing that 26 C.F.R. § 478.11 "define[s] 'committed to a mental institution' as '[a] formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. Persons in a mental institution for observation or on a voluntary basis are not within the purview of the statute.'")

illness is distributed, and in the mechanisms through which the state may revoke the rights of those deemed unsuitably situated to own or possess firearms.

1. Due Process: Protected Property Interests

The first clear constitutional issue with these provisions is that they direct the revocation of property interests without any notice or hearing. The Fourteenth Amendment prohibits states from depriving “any person of . . . property, without due process of law . . .”¹¹¹ The Supreme Court has found the “fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time, and in a meaningful manner.’”¹¹² While a pre-deprivation hearing is ideal, intentional deprivations of property do not violate the Due Process Clause where adequate state post-deprivation remedies are available.¹¹³ The New York SAFE Act prescribes a procedure that would violate these protections, because it requires the state ultimately to seize private property without providing notice or a hearing, either prior to the deprivation or afterwards.¹¹⁴ Nothing in the statutory scheme allows for any hearing, review, or appeal of a mental health professional’s determination of dangerousness or any of the subsequent steps set into motion by that determination, which can ultimately result in the forced surrender of privately-owned firearms.¹¹⁵

The SAFE Act also requires the immediate revocation of any gun permit registered to an individual who has been reported by his or her mental health professional. In *Board of Regents v. Roth*, the Supreme Court found that protected “[p]roperty interests are . . . not created by the Constitution. . . . Rather they are created and their

¹¹¹ U.S. CONST. amend. XIV, § 1.

¹¹² See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545 (1965)).

¹¹³ See *Hudson v. Palmer*, 468 U.S. 517, 533 (1984).

¹¹⁴ See N.Y. PENAL LAW § 400.00(11)(b)-(c) (provisions requiring revocation of firearm license and subsequent surrender of firearms without providing for notice or a hearing).

¹¹⁵ However, if an individual refuses to surrender his firearms, and they are seized pursuant to N.Y. PENAL LAW § 265.01 (LexisNexis 2013), he or she would undoubtedly be entitled to the full panoply of due process that accompanies a criminal prosecution.

dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .”¹¹⁶ Courts in the Second Circuit examining gun license revocation statutes have acknowledged that individuals have a protected property interest in their lawfully granted license to own or carry a firearm.¹¹⁷ The SAFE Act’s automatic license revocation scheme, therefore, also raises serious procedural due process concerns.

2. The Right to Bear Arms: *Heller* and its Progeny

These provisions also directly implicate “the right of the people to keep and bear Arms,” as described in the Second Amendment.¹¹⁸ The Supreme Court in *District of Columbia v. Heller* found that this clause connotes an individual right.¹¹⁹ Like other fundamental rights, the right to bear arms is subject to regulation.¹²⁰ While the *Heller* Court clarified that nothing in its opinion “should be taken to cast doubt on longstanding prohibitions on the possession of firearms by . . . the mentally ill,” the Supreme Court has long held that the Fourteenth Amendment’s Due Process Clause includes a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests.”¹²¹ In *N.A.A.C.P. v. Button*, the Court found that limitations upon enumerated individual rights are only justified by “a compelling state interest in the regulation of a subject within the State’s constitutional power to regulate . . .”¹²²

¹¹⁶ Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

¹¹⁷ See Kuck v. Danaher, 600 F.3d 159, 164 (2d Cir. 2010) (“[T]he state’s ability to regulate firearms does not extinguish the liberty interest at stake or eliminate the need to afford due process . . . permit renewal applicants are entitled to basic due process protections, including a meaningful opportunity to be heard after a denial or revocation.”); Osterwell v. Bartlett, 819 F. Supp. 2d 72, 89 (N.D.N.Y. 2011) (finding that gun license applicant was not denied due process because he had opportunity for hearing).

¹¹⁸ U.S. CONST. amend. II.

¹¹⁹ 554 U.S. 570, 595 (2008) (“[T]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”).

¹²⁰ *Id.* at 626 (“Like most rights, the right secured by the Second Amendment is not unlimited.”).

¹²¹ *Id.*; Washington v. Glucksberg, 521 U.S. 702, 719 (1997).

¹²² 371 U.S. 415, 438 (1963).

The State of New York should not deprive the mentally ill of possessing firearms merely because the *Heller* Court made clear that states have regulatory power over the right to bear arms. A regulation amounting to full deprivation should not survive a due process challenge absent an overriding compelling interest. In addition to showing that it has a compelling interest, a state attempting to infringe on a fundamental right must also show that such infringement is narrowly tailored to achieve a compelling interest.¹²³ Therefore, it might be expected that the Fourteenth Amendment should require that the SAFE Act's restrictions upon individual Second Amendment rights be a narrowly tailored means to achieve a compelling state interest.

Nonetheless, in the aftermath of *Heller*, federal courts have applied a significantly lower standard when construing a state's regulation of the rights of presumptively dangerous people under the Second Amendment. The Third Circuit in *U.S. v. Marzzarella* interpreted a federal indictment for the removal of a firearm's serial number.¹²⁴ It decided that the *Heller* opinion actually suggested that a two-pronged approach is necessary for analyzing Second Amendment challenges.¹²⁵ First, courts should ask whether a challenged restriction "imposes a burden of conduct falling within the scope of the Second Amendment's guarantee," and should only follow the second step—applying an intermediate scrutiny standard—if the first prong is satisfied.¹²⁶ The court found that the "longstanding prohibitions" described in the *Heller* decision represented general exceptions to the right to bear arms, because the Second Amendment codified a pre-ratification understanding of the right and its exceptions.¹²⁷ The court suggested that because the Second Amendment "affords no protection for . . . possession by . . . the mentally ill," a challenge to a mental illness gun regulation might not survive the first prong of the applicable analysis.¹²⁸ Federal courts in other circuits proceeded to

¹²³ *Burson v. Freeman*, 504 U.S. 191, 198 (1992).

¹²⁴ 614 F.3d 85, 98 (3d Cir. 2010).

¹²⁵ *Id.* at 89.

¹²⁶ *Id.* (citing *United States v. Stevens*, 533 F.3d 218, 233 (3d Cir. 2008)).

¹²⁷ *Heller*, 554 U.S. at 626; *Marzzarella*, 614 F.3d at 91 (citing *Heller*, 554 U.S. at 626).

¹²⁸ *Id.* at 92.

apply this two-prong test to other Second Amendment challenges.¹²⁹

a. Application of *Heller* and *Marzzarella* to the Mentally Ill

In 2009, the Fourth Circuit in *U.S. v. McRobie* upheld a defendant's conviction under the Gun Control Act of 1968 for possession of a firearm by a person committed to a mental institution, despite the defendant's argument that his individual right to bear arms was protected by the *Heller* decision.¹³⁰ The court found that the defendant's argument "founder[ed] on the very case upon which it relie[d]," because of the specific exclusion in *Heller* for prohibitions on the possession of firearms by the mentally ill.¹³¹ In 2012, the Ninth Circuit found in a similar case that a defendant's Second Amendment challenge was invalid because his prior adjudication as a "mental defective" imposed a constitutionally permissible restriction upon his right to bear arms.¹³² Four months later in *Tyler v. Holder*, the Western District of Michigan applied the *Marzzarella* two-prong test to another challenge to the Gun Control Act's mental illness prohibitions.¹³³

The plaintiff in *Tyler* had attempted to purchase a firearm, but was informed by the local sheriff's department that he was prohibited from possessing one because he had been involuntarily committed twenty-seven years beforehand for a period of less than thirty days.¹³⁴ He sought declaratory and injunctive relief against the government for violation of his right to bear arms.¹³⁵ He argued that the appropriate inquiry under the first prong of the *Marzzarella* test should not be whether the Second Amendment protects the mentally ill in general, but whether it "extends to individuals who do not present a real danger."¹³⁶ However, finding that *Heller* recognized that

¹²⁹ See *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *Ezell v. City of Chicago*, 651 F.3d 684, 701-03 (7th Cir. 2011); *United States v. Reese*, 627 F.3d 792, 800-01 (10th Cir. 2010).

¹³⁰ No. 08-4632, 2009 WL 82715 (4th Cir. Jan. 14, 2009).

¹³¹ *Id.* at *1.

¹³² *Petramala v. U.S. Dept. of Justice*, 481 Fed. Appx. 395, 396 (9th Cir. 2012).

¹³³ See *Tyler v. Holder*, No. 1:12-CV-523, 2013 U.S. Dist. LEXIS 11511, 2013 WL 356851, at *2, *6-7 (W.D. Mich. Jan. 29, 2013).

¹³⁴ *Id.* at *10.

¹³⁵ *Id.*

¹³⁶ *Id.* at *10.

the right to bear arms does not extend to the mentally ill, and that Congress defined mental illness in such a way that included the plaintiff, the court held that the challenge could not survive the first prong of the *Marzzarella* test.¹³⁷

This analytical framework is disturbing for several reasons. First, it appears without much explanation to contradict the general notion that enumerated and fundamental rights, including the right to bear arms, are subject to strict scrutiny analysis, as noted above. Second, it takes the frightening step of acknowledging that a constitutional right is, on one hand, fundamental, but, on the other, wholly inapplicable to an entire class of citizens because of disabling, and often, immutable characteristics. The *Heller* Court recognized in the Second Amendment a “natural right of defense ‘of one’s person.’”¹³⁸ It also recognized that the restrictions upon that right are directly comparable to those upon the First Amendment right to free speech.¹³⁹ Notably, no court has ever found that the protection of the First Amendment does not extend to a particular class of people for any reason. In fact, First Amendment jurisprudence is rife with cases extending the right of free speech to convicted felons, flag-burning communists, members of the Ku Klux Klan, corporations, and other assorted unpopular groups.¹⁴⁰ Challenges to restrictions upon the First Amendment are routinely analyzed through a strict scrutiny framework.¹⁴¹ Neither *Marzzarella* nor the cases following it

¹³⁷ *Id.*

¹³⁸ *Heller*, 554 U.S. at 585 (emphasis added).

¹³⁹ *Id.* at 595 (“[W]e do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose.”).

¹⁴⁰ *Procunier v. Martinez*, 416 U.S. 396, 408 (1974) (“Whatever the status of a prisoner’s claim to uncensored correspondence with an outsider . . . the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication.”); *Texas v. Johnson*, 491 U.S. 397 (1989) (finding that flag burning was protected expression under the First Amendment); see *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (holding that criminal syndicalism act was overly broad); see *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (holding that corporate funding of independent political broadcasts cannot be limited as political speech is indispensable to democracy).

¹⁴¹ See, e.g., *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654 (1990); *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *United States v.*

convincingly describe any reason for applying a different standard to the Second Amendment.

The third problem with *Marzzarella*'s analytical framework in the context of mental illness is that its approach allows for the contours of the excluded class to be legislatively defined. The *Tyler* Court found that the plaintiff was mentally ill because Congress chose to classify the mentally ill as those "adjudicated as . . . mental[ly] defective," or those who have been committed to a mental institution.¹⁴² The plaintiff in *Tyler* had been committed to a mental institution.¹⁴³ The Court's logic opens the door for legislatures to adjust the protections of the Second Amendment at their will, by simply manipulating their definitions of mental illness as liberally or conservatively as they wish.

The fourth and most disturbing problem with *Tyler*'s application of the *Marzzarella* test is that mental illness simply does not fall under the first prong of the test, according to the logic in the *Marzzarella* opinion itself. The Third Circuit in *Marzzarella* understood *Heller* to stand for the proposition that the Second Amendment does not, under any circumstances, protect the mentally ill, based entirely upon the following language from Justice Scalia's majority opinion in *Heller*:

Like most rights, the Second Amendment right is not unlimited. It is not a right to keep and carry any weapon in any manner whatsoever and for whatever purpose: For example, concealed weapons prohibitions have been upheld under the Amendment or state analogues. The Court's opinion should not be taken to cast doubt on the longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.¹⁴⁴

Considering this specific paragraph, the *Marzzarella* Court commented that, "if the right to bear arms as commonly understood

Grace, 461 U.S. 171, 177 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

¹⁴² 18 U.S.C. § 922(g)(4) (2012); *Tyler*, 2013 U.S. Dist. LEXIS 11511 at *10.

¹⁴³ *Tyler*, 2013 U.S. Dist. LEXIS 11511 at *2-3.

¹⁴⁴ *Heller*, 554 U.S. at 571.

at the time of ratification did not bar restrictions on possession by felons or the mentally ill, it follows that by constitutionalizing this understanding, the Second Amendment carved out these limitations from the right.”¹⁴⁵

However, despite Justice Scalia’s famous fondness for supporting strict textual interpretations of the Constitution through examination of the history and traditions of the common law as it stood before the ratification of the Bill of Rights, the prohibitions on the possession of firearms by the mentally ill are only about as “longstanding” as the 1968 Gun Control Act.¹⁴⁶ In addition, there is no evidence in the history-rich *Heller* decision or elsewhere that the framers of the Second Amendment ever considered mental illness with respect to the right to bear arms.¹⁴⁷ The colonial legislatures of the seventeenth century passed laws prohibiting gun ownership by anyone other than white Protestant adult male property holders, but did not specify as to the mental health of those included or excluded by such legislation.¹⁴⁸ Some of the first documented discussion of gun prohibitions due to mental illness appeared as late as 1915, when Lucilius Emery advocated in the *Harvard Law Review* that the Second Amendment should not apply to persons without “military capacity to bear arms in military organizations,” excluding, “[w]omen, young boys, the blind, tramps, persons *non compos mentis*, or dissolute in habits . . .”¹⁴⁹ However, no American legislation formally regulated the gun rights of the mentally ill until 1968, when Congress passed the Gun Control Act. The *Marzzarella* Court’s notion that the mental illness bar is somehow so rooted in tradition that it was implied at the drafting of the Second Amendment has no apparent factual basis, and the application of the two-prong test to issues of mental illness is therefore inappropriate.

¹⁴⁵ *Marzzarella*, 614 F.3d at 91.

¹⁴⁶ See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997).

¹⁴⁷ Even if there were such evidence, the concept of mental illness as it existed in 1791 bears very little resemblance to modern psychiatric discourse. See generally EDWARD SHORTER, *A HISTORY OF PSYCHIATRY: FROM THE ERA OF THE ASYLUM TO THE AGE OF PROZAC* (1998).

¹⁴⁸ Bellesiles, *supra* note 17, at 144.

¹⁴⁹ Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 HARV. L. REV. 473, 476 (1915).

b. The Revocation and Seizure Provisions of the SAFE Act
Sweep Too Broadly

New York law now criminalizes the purchase or possession of firearms or firearms licensure to anyone who: has stated that they have ever suffered any mental illness; has been confined to any hospital or institution, public or private, for mental illness; has been appointed a guardian pursuant to any provision of state law based upon a determination of diminished capacity due to mental illness; has been found likely to engage in conduct that would result in serious harm to self or others by any physician, psychologist, licensed clinical social worker, or registered nurse; has been acquitted of a crime by reason of mental disease or defect; or has been found incompetent to stand trial in a criminal case.¹⁵⁰

It is important to note that some of these classifications could be implemented in ways that affect individuals who are not in fact suffering from actual mental illness. For instance, under the statutory scheme a professional boxer's podiatrist might be required to report that his patient, who is preparing for an upcoming fight, is likely to engage in conduct that will result in serious harm to himself or others. The scheme also includes all persons who have been found incompetent to stand trial, despite the fact that mental illness is not the only grounds for such a finding.¹⁵¹ Therefore, even if a court were to uphold the two-prong test established in *Marzzarella*, the SAFE Act would not necessarily fail the first prong as interpreted by *Tyler*. If that is the case, then the SAFE Act would be immune from further

¹⁵⁰ See N.Y. PENAL LAW § 400.00 (2013); N.Y. MENTAL HYG. LAW § 9.46(b) (2013); N.Y. CRIM. PROC. LAW § 330.20(2-a) (2013).

¹⁵¹ For example, under New York law, an "incapacitated person" is an individual who "as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense." N.Y. CRIM. PROC. § 730.10 (2013). New York courts have applied this statute to developmentally disabled defendants with no psychological diagnoses. See, e.g., *People v. Sunpok Severance*, 708 N.Y.S.2d 258, 259 (Cnty. Ct. 2000) (explaining that a person may be incapacitated under N.Y. CRIM. PROC. § 730.10 absent any diagnosis of "mental retardation," or any psychiatric illness, so long as "she can neither understand the proceedings against her nor assist in her defense"); *People v. A.S.*, 2011 NY Slip Op 50132(U) (Sup. Ct., Kings Cnty., Feb. 9, 2011) at *3 (while defendant passed the standardized Competency for Assessment for Standing Trial for Defendants with Mental Retardation examination, the court found he was an incapacitated person due to his "fragile, brittle state").

analysis under intermediate scrutiny, because the SAFE Act is not limited in its prohibition to the mentally ill. It could thus reach “conduct falling within the scope of the Second Amendment’s guarantee,” even by the Third Circuit’s historically inaccurate standards in *Marzzarella*.¹⁵²

The broadness of the SAFE Act with respect to individuals not actually suffering from mental illness should also be grounds for striking it down under substantive due process review, even using intermediate scrutiny as the standard of review. Under that standard of review, the government must first establish a “significant,” “substantial,” or “important” interest.¹⁵³ The Fourth Circuit, in *United States v. Chester*, acknowledged that the federal government’s articulated interest in reducing domestic gun violence was sufficiently important to satisfy this first element of the intermediate scrutiny framework.¹⁵⁴ Indeed, many courts have found that general public safety and crime prevention are substantial interests under intermediate scrutiny.¹⁵⁵ However, the state must also establish that there is a reasonable fit between the challenged regulation and the asserted government objective.¹⁵⁶ This fit need not be perfect, but the state must show sufficient evidence to establish a substantial relationship between the means and ends articulated.¹⁵⁷ It is difficult to find evidence that the revocation and seizure provisions of the SAFE Act are substantially related to its interest in public safety.

Despite our collective cultural history of limiting the rights of the mentally ill due to a presumption of dangerousness, and the popular discourse following recent mass shootings connecting mental illness and violence, there is actually very little empirical data supporting the notion that mental illness by itself is a significant cause of violence. In fact, while approximately a quarter of the population of the United States experiences a mental disorder in any given year, mentally ill individuals commit only a small percentage of

¹⁵² *Marzzarella*, 614 F.3d at 89.

¹⁵³ *See* Bd. of Tr. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 478-79 (1989).

¹⁵⁴ *United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010).

¹⁵⁵ *See, e.g.,* Woollord v. Gallagher, 712 F.3d 865 (4th Cir. 2013); Kachalsky v. Westchester, 701 F.3d 81, 97 (2d Cir. 2012) (“New York has substantial, indeed compelling governmental interests in safety and crime prevention”).

¹⁵⁶ *See* Fox, 492 U.S. at 480-81.

¹⁵⁷ *See* Chester, 628 F.3d at 683.

the nation's serious violent crime.¹⁵⁸ A 1998 study examined 1,136 patients between the ages of eighteen and forty who had been diagnosed with mental disorders, but were without symptoms of substance abuse, and monitored their behavior for violence to others after they were discharged from an acute psychiatric inpatient facility.¹⁵⁹ The study also examined the violent behavior of a group of 519 people who resided in the same neighborhoods as the patients, and ultimately found that there was "no significant difference between the prevalence of violence by [mental] patients without symptoms of substance abuse and the prevalence of violence by others living in the same neighborhood who were also without symptoms of substance abuse."¹⁶⁰

Another study of women with psychological disorders and alcoholism showed the combination of an antisocial personality disorder and alcohol use increases the chances of homicide forty to fifty times, whereas the diagnosis of schizophrenia increased the risk only five to six times.¹⁶¹ An alternative study found patients with concurrent diagnoses of substance use disorders and personality disorders to be 240 percent more likely to commit violent acts than mentally ill patients without substance abuse issues.¹⁶² A 2000 study showed that marijuana dependence was more prevalent in violent offenders than schizophrenia, anxiety, or depression.¹⁶³ Thus, while certain kinds of mental illness have been found to correlate with violent behavior, even significant mental illnesses are not as connected to violence as is substance abuse.¹⁶⁴

Beside substance abuse, there are other significant statistical risk factors for violence, particularly male gender, youth, below-average

¹⁵⁸ Matcheri S. Keshavan & Jai L. Shah, Editorial, *Violence and Mental Illness*, 6 ASIAN J. OF PSYCHIATRY 1, 1-2 (2013).

¹⁵⁹ See Henry J. Steadman et al., *Violence by People Discharged from Acute Psychiatric Inpatient Facilities and by Others in the Same Neighborhoods*, 55 ARCH. GEN. PSYCHIATRY 393, 393 (1998).

¹⁶⁰ *Id.* However, the study noted that substance abuse significantly raised the rate of violence in both groups.

¹⁶¹ Marie E. Rueve & Randon S. Welton, *Violence and Mental Illness*, PSYCHIATRY 35, 39 (2008).

¹⁶² *Id.*

¹⁶³ See Virginia Aldige Hiday, *Putting Community Risk in Perspective: A Look at Correlations, Causes and Controls*, 29 INT'L J. OF L. & PSYCHIATRY 316, 318, 320 (2006).

¹⁶⁴ See *id.* at 320.

intelligence, a history of head trauma or neurological impairment, a history of military service, and weapons training.¹⁶⁵ This data supports the notion that “although there is an association between [mental illness and violence], the relationship typically flows through covariates such as history of violence, age, sex, alcohol and substance abuse[,] or personality disorders, not directly stemming from mental illness *per se*.”¹⁶⁶

In general, mental illness by itself does not pose any increased risk of violence when appropriately treated.¹⁶⁷ In fact, people with psychiatric disabilities are far more likely to be victims of violent crime than perpetrators thereof.¹⁶⁸ Individuals suffering from schizophrenia, bipolar disorder, or psychosis are more likely to be attacked, raped, or mugged than members of the general population.¹⁶⁹ If the Second Amendment protects an individual right to self-defense as the *Heller* Court found, it makes little sense that our most vulnerable citizens should be denied that right on the basis of their diagnosis alone.

c. The SAFE Act Does Not Allow For Any Individual Finding of Dangerousness

While there is no substantial relationship between mental illness by itself and violence, this should not lead to the presumption that all gun control legislation pertaining to the mentally ill lacks a substantial connection between its means and purpose. The 1968 Gun Control Act and most of the state laws modeled therefrom generally only limit the rights of those who, because of mental illness, have been individually deemed dangerous through some official process. The Code of Federal Regulations limits the term “adjudicated as a mental defective” to mean those who have been found by a court, board, commission, or other lawful authority to be a danger to themselves to others, or to lack the mental capacity to

¹⁶⁵ *Id.* at 422.

¹⁶⁶ Julio Arboleda-Florez, *Mental Illness and Violence*, 22 CURRENT OPINION IN PSYCHIATRY 475, 476 (2009).

¹⁶⁷ Rueve, *supra* note 161, at 46.

¹⁶⁸ *See* Keshavan, *supra* note 158 at 1.

¹⁶⁹ *Id.*

contract or manage their own affairs.¹⁷⁰ Individuals subject to these statutes, such as the defendant in *Tyler*, have therefore not only been diagnosed with a mental illness, but have also been individually determined to be dangerous by a state authority after a hearing with some minimum standard of due process. The SAFE Act does not limit its reach to such individuals; instead, all that it requires is an independent determination of the likelihood of general danger by a “mental health professional,” or even the mere admission by a license applicant that she has ever suffered any mental illness.

The federal Gun Control Act could survive intermediate scrutiny because it requires individual, official, and procedurally adequate determinations of dangerousness. Such official determinations are sufficient to create the required substantial nexus to the state interest in public safety. On the other hand, the State of New York cannot justify its revocation of the fundamental rights of its most vulnerable citizens by citing its interest in public safety and referencing private, civilian reports that individuals may be “likely to engage in conduct that would result in serious harm to self or others.”¹⁷¹ The revocation provisions of the SAFE Act apply to too broad of a class of people with too little procedural scrutiny, and therefore should not survive a substantive due process challenge.

V. CONCLUSION

While it is troublesome from a legal perspective that some provisions of the SAFE Act appear to seriously conflict with patient confidentiality, due process, and an enumerated constitutional right, the process through which Governor Cuomo and the New York legislature derived these provisions is quite understandable given their historical context. The shootings at Virginia Tech, Northern Illinois University, Fort Hood, Tucson, Aurora, and Sandy Hook all seemed to come in such rapid succession and were so horrific that there must have been a real sense of urgency amongst New York legislators to protect the citizens of their state from similar tragedies. The media coverage of those shootings repeatedly emphasized mental illness, and often probed for answers as to what prophylactic

¹⁷⁰ 27 C.F.R. § 478.11 (2013).

¹⁷¹ N.Y. MENTAL HYG. LAW § 9.46 (2013).

clinical measures could or should have been implemented to prevent them.¹⁷² There is some indication that nearly every perpetrator had some kind of psychological history or was at least perceived as strange by those who knew them, and every single shooting was perpetrated using legally purchased firearms. Under these circumstances, New York lawmakers' attempt to create a kind of catch-all system is entirely understandable. When any individual has access to firearms, his or her capacity for causing harm unquestionably increases; it therefore, makes sense for lawmakers to create rules that minimize that potential for harm, but should only do so within legal bounds. When applied appropriately, gun control legislation in existence prior to the SAFE Act may be good evidence that states and the federal government can in fact restrict the rights of individuals who have been found to be dangerous, without trespassing into areas protected by the Constitution or basic standards of privacy. However, the SAFE Act ventures too far in the direction of an automatic equation of psychological disability with danger, and risks setting a precedent that individuals may be presumptively denied their rights whenever they are perceived to be unpredictable. Though a strong historical tradition exists in this country of drawing a connection between mental illness and violence, the rights of the mentally ill should not suffer from a collective apprehension with little foundation in fact.

¹⁷² See, e.g., Randall W. Bachman, *Would a National Mental-Health Registry Have Prevented Sandy Hook?*, MINNPOST (Jan. 10, 2013), <http://www.minnpost.com/community-voices/2013/01/would-national-mental-health-registry-have-prevented-sandy-hook>; Lana Birbrair, *NIU Shootings Expose the Tension Between Security and Freedom*, NORTH BY NORTHWESTERN (Mar. 6, 2008), <http://www.northbynorthwestern.com/story/niu-shootings-expose-the-tension-between-security/> (discussing counseling center's role in shooting); Dewey Cornell, *Could the System Have Prevented Rampage?*, CNN OPINION, (Jan. 11, 2011, 5:51 AM), <http://www.cnn.com/2011/OPINION/01/10/cornell.tucson.threat.assessment/index.html> ("The rampage shooting in Arizona is another anguishing reminder that mental health is the weakest link in our ailing health care system"); Josh Horwitz, *Aurora's Hard Truth: Mental Health Screening for Gun Buyers Is Nearly Non-Existent*, HUFFINGTON POST, (Aug. 1, 2012), http://www.huffingtonpost.com/josh-horwitz/auroras-hard-truth-mental_b_1727695.html; Edwin Mora, *Lieberman: Fort Hood Massacre Could Have Been Prevented; Government Officials Guilty of 'Negligence'*, CNSNEWS.COM (Feb. 3, 2011), <http://cnsnews.com/news/article/lieberman-fort-hood-massacre-could-have-been-prevented-government-officials-guilty>; Stan Rezaee, *Op-Ed: Virginia Tech Massacre Could Have Been Prevented*, DIGITAL J. (Mar. 16, 2012), <http://digitaljournal.com/article/321257> ("The administration failed to notice the signs that indicated the individual to be a threat to the school.").